UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 28 | Number 2 Article 8

2-1-1950

# Constitutional Law -- Absence of Quorum in Congressional Committee Hearings

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**Constitutional Law—Absence of Quorum in Congressional Committee Hearings**

Petitioner gave false testimony under oath before a standing committee of the House of Representatives, and was convicted of perjury in the district court.[1] The conviction was affirmed in the Court of Appeals,[2] and the Supreme Court granted certiorari.[3] The Court in a five to four decision[4] reversed the conviction, and held that the committee was not a "competent tribunal" within the meaning of the perjury statute,[5] because a quorum of the committee was not "actually physically present" at the time the perjured testimony was given. In so holding the Court was called upon to examine the appropriate parliamentary rules of procedure of the House of Representatives.

The House rules which have been described as "perhaps the most finely adjusted, scientifically balanced, and highly technical rules of any parliamentary body in the world" emanate from four sources: (1) The Constitution of the United States (2) Jefferson's Manual[6] (3) from the rules adopted by the House itself from the beginning of its existence,[7] and (4) from the decisions of the Speakers of the House, and from decisions of the Chairmen of the Committee of the Whole.[8]

The Constitution gives the power to each House of Congress to determine its rules of procedure;[9] however certain limitations on this grant are also contained therein.[10] Among these is the requirement that a majority of each House shall constitute a quorum to do business.[11]

[1] U. S. v. Christoffel,—App. D. C.—(D. D. C. 1948).
[2] Christoffel v. U. S., 171 F. 2d 1004 (D. C. Cir. 1948).
[3] Christoffel v. U.S., 336 U.S. 934 (1949).
[4] Christoffel v. U.S., 338 U.S. 84 (1949). Justices Black, Frankfurter, Douglas and Rutledge joined with Justice Murphy in the majority opinion.
[5] D. C. CODE, Title 22, Sec. 2501 (1940).
[6] In the years from 1797 to 1801 Thomas Jefferson who was then Vice-President of the U.S. and President of the Senate, prepared the notable work which is now known as JEFFERSON'S MANUAL. This work has contributed much to the procedure of the House, and in 1837 the House passed a rule, which still exists, permitting the provisions of the Manual "to govern the House in all cases to which they are applicable, and . . . not inconsistent" with the House rules. JEFFERSON'S MANUAL §938. The Manual along with other House rules is now published as a public document, the current issue being H. R. Doc. No. 766, 80th Cong., 2d Sess. (1949).
[7] JEFFERSON'S MANUAL §§621-958.
[8] These rulings are to the rules of the House what the decisions of the courts are to the statutes. All of the decisions (more than 11,000 in number) have been embodied in HINDS' PRECEDENTS and CANNON'S PRECEDENTS.
[9] U.S. CONST., Art. 1, §5, cl. 1. Some text writers have expressed the view that the power of a legislative body to make its own rules is an inherent power and no constitutional mandate is necessary. 1 SOUTHERLAND, STATUTORY CONSTRUCTION, §602.
[10] U. S. CONST. Art. 1, §§5, 7.
[11] U.S. CONST. Art. 1, §5, cl. 2. After organization of the House the quorum consists of a majority of those members chosen, sworn and living, whose membership has not been terminated by resignation or by action of the House. IV HINDS' PRECEDENTS §§2889, 2890; VI CANNON'S PRECEDENTS 638. Under Speaker Reed's

Accordingly it has been frequently ruled, that upon failure of a quorum, no business, however highly privileged, is in order, and the only motions entertainable are those for a call of the House or to adjourn.[12] Yet, it seems to be the accepted practice of the House that a quorum is presumed to be present until otherwise determined,[13] and no affirmative duty seems to be placed upon the Chair to ascertain the presence of a quorum unless the point is raised or disclosed.[14] Once absence of a quorum is disclosed on a point of order,[15] or a division,[16] by tellers,[17] or on a yea or nay vote,[18] business is automatically suspended,[19] and no business may be transacted, even by unanimous consent,[20] and there must be a quorum of record before the House may proceed;[21] nevertheless once a proceeding is completed it is then too late to make the point that a quorum was not present when action was taken.[22]

The rules of the House are expressly made the rules of the standing committees in so far as they are applicable.[23] A majority of a committee constitutes a quorum for business,[24] and no measure or recommendation may be reported from a committee unless a majority of the committee is actually present.[25] Contrary to the House practice, there must be a quorum of record before the committee may proceed with business.[26]

In applying these rules the Court seemed to narrow the issue to the question—Once a quorum is ascertained on the record of the committee, does the presumption prevail that a quoroum continues until the point of no quorum is made?

In a vigorous dissent,[27] the minority insisted that the quorum

famous "count," the principle of a present rather than voting quorum was accepted, when Reed counted members present for purposes of a quorum, even though they refused to vote. The constitutionality of this rule was questioned and upheld in U.S. v. Ballin, 144 U.S. 1 (1892), the Court ruling therein that the Constitution prescribed no method of determining the presence of a majority.

[12] JEFFERSON'S MANUAL §768, IV HINDS' PRECEDENTS §2950; VI CANNON'S PRECEDENTS §680.

[13] VI CANNON'S PRECEDENTS §624.

[14] VI CANNON'S PRECEDENTS §565. Even upon convening the House each day it is not incumbent on the Speaker to raise the quorum question. IV HINDS' PRECEDENTS §2733; VI CANNON'S PRECEDENTS §624.

[15] VI CANNON'S PRECEDENTS §662. [16] IV HINDS' PRECEDENTS §2933.

[17] VI CANNON'S PRECEDENTS §707; VIII CANNON'S PRECEDENTS §3097.

[18] IV HINDS' PRECEDENTS §2953; VI CANNON'S PRECEDENTS §624.

[19] IV HINDS' PRECEDENTS §§2933, 2934; VI CANNON'S PRECEDENTS §662.

[20] IV HINDS' PRECEDENTS §2951; VI CANNON'S PRECEDENTS §§660, 686, 689.

[21] IV HINDS' PRECEDENTS §§2952, 2953.

[22] VI CANNON'S PRECEDENTS §655. [23] JEFFERSON'S MANUAL §738.

[24] JEFFERSON'S MANUAL §409; IV HINDS' PRECEDENTS §§4540, 4552.

[25] JEFFERSON'S MANUAL §943. [26] VIII CANNON'S PRECEDENTS §2222.

[27] Justice Jackson writing for the minority was joined by Chief Justice Vinson and Justices Reed and Burton. The dissent was based in part on the fact that the identical issue had been raised in a previous perjury case and the Court denied certiorari. Meyer v. U.S., 171 F. 2d 800 (D. C. Cir. 1948), *cert. denied,* 336 U.S. 912 (1949).

established at the convening of the committee session was presumed to continue in absence of a challenge to the contrary, and contended that the Court in holding otherwise was denying to the records and rules of the Congress the respect and reliance to which they are entitled.

The "presumption" rule unquestionably is the "law" of the House, but a search reveals no incident where the specific point has been dealt with in committee. In the principal case there was a recorded quorum when the committee convened, and the point of no quorum was neither raised by petitioner nor a committee member.[28] The Court places much reliance on the rule that no bill may be reported from a committee unless a majority of the committee was actually present.[29] The rule seems inappropriate for the purposes of this case. Indeed, the very fact that the rule applies on its face only to the reporting of a bill, suggests that a "physically present" quorum is not necessary to the competency of the committee for some lesser purpose such as receiving testimony. Besides, the argument might well be made that since the committee rules are the same as the House rules where applicable, the "presumption" rule prevails in the committee subject to the one condition that a quorum must be on record before the proceeding start. The Court while apparently applying one of these rules, seemingly is unwilling to apply the other. Therefore, the result reached seems to be justified only by a strict, literal interpretation of the committee rule requiring a quorum to do business, and upon the consideration that the Court was satisfying a requirement of a criminal statute. From a practical viewpoint, considering the possible delays and inconveniences to the orderly facilitation of committee business, the requisite of a "physically present" quorum seems extremely harsh if it is to apply to all testimony as distinguished from testimony taken under oath as in the principal case. There is ample evidence of Congressional disapproval with the result reached.[30] In fact a bill has been introduced which would expressly make the "presumption" rule applicable to committees.[31]

Assuming that the decision rendered in the principal case would indicate that an actual quorum must be present in order that a Congressional committee may transact any business, does it follow that the

[28] Can a witness raise a point of no quorum? The Court did not rule on this, but indicated that the privilege is limited to members of the committee. The dissent suggested that a witness might well raise the point, and if the objection be overruled, he would be at liberty to leave the hearing. H. R. 6166, 81st Cong., 1st Sess. (1949), introduced shortly after this decision recognizes the right of a witness to make the point of no quorum.

[29] See note 25 *supra*.

[30] 95 CONG. REC. A4366 (June 29, 1949); 95 CONG. REC. 9845, 9858, 9859, 9884 (July 18, 1949); 95 CONG. REC. A4902 (July 21, 1949).

[31] H. R. 6166, 81st Cong., 1st Sess. (1949). No action was taken during the 1st Session on this measure.

same rule would be made applicable in the House? The possibility that legislation passed without a record vote might be "invalidated" was suggested by the dissent.[32]

If the Court continues to follow the policy of several of its previous decisions,[33] to the effect that the enrolled bill[34] is conclusive evidence of enactment, and that no other evidence is admissable to establish that the bill was not lawfully enacted, such a proposition as is envisioned by the dissent would seem to be without foundation.

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**Constitutional Law—Freedom of Speech—Conflict with Power of State to Control Breaches of the Peace**

There are inherent inconsistencies between the power of the state to punish breaches of the peace and the constitutional protections of the First Amendment. The case of *Terminiello v. Chicago*[1] exemplifies the problem of weighing the sometimes conflicting social interests in the maintenance of public order and in the free expression of ideas.

The case arose out of an address by Terminiello before an audience of over eight hundred. About one thousand persons, opposed to his espoused doctrine of racial and religious supremacy, had gathered about the auditorium in protest. A police detail, assigned to the meeting, was unable to prevent several disturbances and minor acts of violence. The speech itself viciously attacked various political and racial groups. The general setting, then, was an address, pseudopolitical in nature, but scurrilous and opprobrious in content, delivered in an auditorium surrounded by an angry and turbulent crowd.

Terminiello, after jury trial, was convicted of violating an ordinance[2] of the City of Chicago by making an improper noise or diversion tending to a breach of the peace.

The trial court charged that "misbehavior may constitute a breach

[32] Christoffel v. U.S., 338 U.S. 84 (1949).

[33] Field v. Clark, 143 U.S. 649 (1891); Lyons v. Woods, 153 U.S. 649 (1894); Harwood v. Wentworth, 162 U.S. 547 (1896); Twin City Bank v. Nebeker, 167 U.S. 196 (1897); Hubbard v. Lowe, 226 F. 135 (S. D. N. Y. 1915); *see* Coleman v. Miller, 307 U.S. 433, 457 (1939) (concurring opinion); Flint v. Stone Tracy, 220 U.S. 107, 143 (1910); *cf.* Leser v. Garnett, 258 U.S. 130 (1922); U.S. v. Ballin, 144 U.S. 1 (1892).

[34] An enrolled bill generally refers to a bill which purports to have passed both houses of the legislature, and which has been signed by the presiding officers of the two houses. The Supreme Court of the U.S. includes not only process of enactment within the legislature itself, but also signature by the President and filing with the Secretary of State.

[1] 69 Sup. Ct. 894 (1949).

[2] "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace . . . shall be deemed guilty of disorderly conduct . . ." , City of Chicago, REV. CODE 1939, c. 193, §1(1).